Supreme Court, U.S.
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No. 03-982

IN THE

Supreme Court of the United States

DANA P. WALZ, Guardian ad litem, on behalf of Daniel Walz,

Petitioner,

v.

EGG HARBOR TOWNSHIP BOARD OF EDUCATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a student attending pre-kindergarten, kindergarten and first grade, respectively, has a First Amendment right to distribute items bearing overtly religious messages to a captive audience of four, five and six year old children during annual in-class school sponsored seasonal events intended to achieve certain learning objectives.

II. Whether providing alternate times and/or locations on school premises for distribution of items bearing overtly religious messages constitutes a violation of Petitioner's First Amendment rights.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table Of Contents	ii
Table Of Cited Authorities	iii
Statement Of The Case	1
Reasons To Deny The Petition	5
I. The Third Circuit Court Of Appeals' Decision Does Not Conflict With The Decisions Of The Seventh Circuit	5
II. The Third Circuit Applied The Appropriate First Amendment Analysis Which Is Based Upon Established Legal Principals Applicable In The Particular Context.	9
Conclusion	18

TABLE OF CITED AUTHORITIES

Page

Cases:

Bell v. Little Axe Independent School District No. 70, 766 F.2d 1391 (10th Cir. 1985) 12

Bethel Sch. Dist. No. 403 v Fraser, 478 U.S. 675 (1986) 6, 10, 13, 15

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 14

DeNooyer v. Livonia Public Schools, 799 F. Supp. 744 (E.D. Mich. 1992) *aff'd*, 12 F.3d 211 (6th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994) 12

Edwards v. Aguillard, 482 U.S. 578 (1987) 13

Good News Club v. Milford Central School, 533 U.S. 98 (2001) 14, 15

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) ..... *passim*

Hedges v. Wauconda Community Unit School District, 9 F.3d 1295 (7th Cir. 1993) 6, 7, 8

Lee v. Weisman, 505 U.S. 577 (1992) 10

Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997) ..... *passim*

Cited Authorities

Page

Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989) *cert. denied*, 493 U.S. 1021 (1990) 12

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) 6

S.G. v. Sayreville Bd. of Ed., 333 F.3d 417 (3rd Cir 2003), *cert. denied*, 124 S. Ct. 1040 (2004) ... 15-16, 17

Saxe v. State College Area Sch. Dist., 240 F.3d 200 (3rd Cir. 2001) 7, 8

Sch. Dist. v. Schempp, 374 U.S. 203 (1963) 13

Sypniewski v. Warren Hills Regional Bd. of Ed., 307 F.3d 243 (2002), *cert. denied*, 123 S. Ct. 2077 (2003) 17

Tinker v. Des Moines Independent Com. Sch. Dist., 393 U.S. 503 (1969) ..... *passim*

Walker-Serrano v. Leonard, 325 F.3d 412 (3rd Cir. 2003) 6, 15, 16

Zykan v. Warsaw Com. Sch. Corp., 631 F.2d 1300 (7th Cir. 1980) 12-13

United States Constitution:

First Amendment ..... *passim*

STATEMENT OF THE CASE

Petitioner, Daniel Walz, bases his complaint upon three events each of which occurred during an in-class school sponsored seasonal party. Each event took place during regular school hours. All students were required to attend and non-parent outsiders were not allowed to attend the events. App. B19. All events were closely controlled and monitored by the principal and teachers. App. B8. Further, as detailed below, Respondent provided numerous legitimate pedagogical reasons underlying its policies, as well as, application of those policies in this case. Moreover, Petitioner was permitted to distribute his proselytizing items on school premises outside of the context of the in-class school sponsored activities.

In the Spring of 1998, Petitioner's mother, Mrs. Dana Walz, purchased pencils inscribed with a religious message: "Jesus (heart symbol) the Little Children." She selected the pencils for Petitioner to distribute at an in-class event because of the message and the intended audience, children. App. B2. Petitioner attempted to distribute the pencils at the school's in-class spring party. Petitioner, who was approximately 4 years old at the time, was attending developmental kindergarten (known as "pre-kindergarten"). App. B2. Once Petitioner's teacher noticed the pencils, she collected them and made an inquiry to the school administration. App. B3. Mrs. Walz attended the event as a chaperone and does not recall the exchange of any wrapped gifts at that party.

Ultimately, Dr. Leonard Kelpsh, the Superintendent of the Respondent's schools, was contacted regarding distribution of the proselytizing pencils and concluded that Petitioner should distribute the pencils at a different time

and location based upon the items' lack of neutrality, the closed nature of a school, the potential for parents to misconstrue the message contained on the pencils as school sponsored and the availability of other locations in or at the elementary school for distribution. App. B3, B8. Moreover, other items with endorsements were not allowed to be distributed in class during school hours, including items with political, commercial or religious references. App. A3; App. B16. According to Dr. Kelpsh, the school's job was to develop curriculum, not endorse a particular view. Under the policy, a student would not be allowed to distribute pencils that stated "Home Depot" or "Support the New Jersey Education Association." *Id.*

In 1998, Mrs. Walz's daughter returned from a local event with a copy of the evangelical story, "A Candy Maker's Witness." App. B4-B5. The story is overtly religious and attributes religious significance to the candy cane. *See* App. B5-B6, n.2. Mrs. Walz entered the story into her computer, printed out copies of it, purchased candy canes separately, affixed the evangelical story to the candy canes with a ribbon and placed them in a basket. App. B4. Mrs. Walz chose the message because it was symbolic of the Christian holiday and attributed religious significance to the candy cane. *Id.*; App. A5. Mrs. Walz provided Petitioner with the candy canes to which she attached the evangelical story for distribution at a school sponsored winter party for kindergarten children in December 1998. App. B4-B5 At that time, Petitioner was just over 5 years old and his classmates were approximately the same age. *Id.* Prior to the event, Mrs. Walz contacted the school regarding distribution of the evangelical candy canes and was informed that Petitioner could distribute such before school, during recess or after school, but not inside the classroom. *Id.*; App. A5. Ultimately,

Petitioner was permitted to distribute the candy canes with the proselytizing message in the elementary school hallway. App. B5; App. A5.

The third event raised in Petitioner's Complaint transpired in December of 1999 during a school sponsored in-class activity for first grade children, a winter party. App. B7. Again, Mrs. Walz contacted the school regarding distribution of the evangelical candy canes and was informed that Petitioner could distribute such before school, during recess or after school, but not inside the classroom. *Id.*; App. A5. In fact, Petitioner distributed the evangelical candy canes in the hallway of the school. App. B7; App. A5. Mrs. Walz stated that the items distributed during the December 1999 event where generic in nature. *Id.* Petitioner has not been prevented from handing out items promoting his religious ideologies in the hallways of his elementary school or during recess. *Id.*

According to Dr. Kelpsh, the in-class seasonal activities were intended to promote sharing and caring among students, to develop social skills, and to learn about talking in turn in a large group. App. B16; App. B19. Children were taught important social skills at the parties and were not permitted to freely walk around or talk at will. App. B19.

The age or maturity of the students also played a part in Dr. Kelpsh's decisions regarding in-class distribution of items endorsing or promoting particular ideals or individuals for two reasons: (1) he questioned whether Petitioner, a very young child, decided or understood what it meant to promote such religious beliefs and whether this was the parent attempting to impose such beliefs upon other students in the classroom environment; and (2) the ability of other students

to understand that communication as solely made by another student and not endorsed by the school in the context of in-class distribution.

Petitioner presented no facts to contradict Respondent's evidence that the school took affirmative steps to regulate the items distributed at each in-class activity. App. B16. In accordance with the Respondent's general policy regarding collection and distribution of items at the seasonal parties, in or around December 1999, the local Parent Teacher Organization ("PTO") sent instructions home to parents which provided a list of "do's and don't's" for the upcoming in-class winter party. App. B7, n.3; App. B7-8; App. A5. Notably, the "Don'ts" listed in the notice include "Don't forget to keep the parties as generic as possible." Further, the instructions make clear that "gifts" were to be provided to the PTO which would distribute the gifts at the event. App A2; App. B7; App. A5. Parents and children generally would respond to the requests with generic donations. App. A2. Notably, students were not asked to bring in gifts with their favorite seasonal message. App. B16. Mrs. Walz could not identify any gift containing a non-religious message which was distributed during any of the in-class school sponsored events. App. B8; App. A5-6.

According to Dr. Kelpsh, direct gifts from students were discouraged because of the economic diversity of the community, the economic strain it would cause some students, and the potential distress caused to those who could not afford to participate. App. B7-B8. Dr. Kelpsh explained that:

> Socially, economically, [our student body is] very diverse, and we just don't like to take the risk that, one, kids would see other kids doing it

> and feel they have to do it, and they can't afford to do it; and two, you know, sometimes kids don't get everyone something in class.

App. A2.

Although unwritten, the above policy is communicated orally by the administration to teachers who disseminate the information to other teachers, parents and students. App. B8.

The Third Circuit and Federal District Court for the District of New Jersey relied upon the above facts in support of their decisions.

REASONS TO DENY THE PETITION

I. THE THIRD CIRCUIT COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THE SEVENTH CIRCUIT

Petitioner's claim of conflict among the Third and Seventh Circuits rests upon the unsupported factual contention, rejected by the Courts below, that Respondent engaged in unlawful viewpoint discrimination against Petitioner's religious speech. App. B15-16 ("The school's regulation of [Petitioner's] speech was viewpoint neutral"); *see also,* App. A15-16 and A19; App. B15-16. Further, Petitioner incorrectly asserts that "it is undisputed that the only reason Respondents refused to allow [Petitioner] to distribute his gifts was because they included religious messages [and] . . . [Petitioner's] classmates were permitted to distribute generic gifts inside the classroom at the same time." In fact, Petitioner offered "no proof that other children were allowed to disseminate messages in class or at in-class, school sponsored parties" and conceded that the gifts he

claims were distributed by other children were generic in nature. App. B16; *see also* App. A6 and App. B7. Petitioner also conceded that no other religion was treated more favorably than his own. *Id.*

Viewpoint discrimination is a form of content discrimination which occurs when the government targets not the subject matter, but the particular views taken by the speaker on a subject. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). Moreover, that the Respondent provided other alternatives for Petitioner to distribute proselytizing items on school premises is evidence that the Respondent's decisions were not based on animus to Petitioner's religious beliefs, but to the particular mode of expression under the particular circumstances. App. A18; *see Walker-Serrano v. Leonard*, 325 F.3d 412, 419 (3rd Cir. 2003), *cert. denied*, 123 S. Ct. 2077 (2003); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 689 (1986) ([T]here is no suggestion that school officials attempted to regulate [Petitioner's] speech because they disagreed with the views [he] sought to express. Nor does this case involve an attempt by school officials to ban written materials they consider "inappropriate" for [elementary] school students, or to limit what students should hear, read, or learn about.)

Petitioner relies upon two Seventh Circuit opinions in support of a claimed conflict, *Hedges v. Wauconda Community Unit School District*, 9 F.3d 1295 (7th Cir. 1993) and *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997). Both cases are distinguishable on their facts, the law, or otherwise reconcilable with the opinions of the Third Circuit.

In *Hedges v. Wauconda Community Unit School District*, *supra*, the Seventh Circuit held that a school policy which specifically prohibited distribution of materials with religious content in the school's hallways violated a junior high school student's First Amendment rights. 9 F.3d at 1297-98. The Seventh Circuit recognized the significant difference between the government's lawful ability to prohibit certain categories of speech and the unlawful viewpoint discrimination embodied by a policy which specifically targeted material containing religious information. *Id.* at 1298 ("Even when government may forbid a category of speech outright, it may not discriminate on account of a speaker's viewpoint.") Notably, the Court recognized that schools are typically closed forums wherein most daily activities are strictly regimented especially during class when students discuss subjects of the school's devising and not of their own preference. *Id.* at 1301. As a result, the Court determined that limiting distribution to a designated place and prohibiting distribution of material primarily prepared by non-students was not unlawful. *Id.*[1]

In a comparable case, *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001) the Third Circuit reached a result similar to that of the Seventh Circuit in *Hedges*. Reversing the lower court, the Third Circuit agreed with the students' First Amendment challenge to an overly broad school district anti-harassment policy which prohibited, *inter alia*, unwelcome verbal conduct which offends an individual based upon their sexual orientation. The plaintiffs in *Saxe*

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1. Although Petitioner argues that the policy in *Hedges* governed elementary and junior high school students, the Seventh Circuit's subsequent opinion in *Muller* recognized that "the environment of an elementary school was not at issue in [*Hedges*]". *Muller*, 98 F.3d at 1538.

were devout Christian students who successfully argued that the policy prohibited them from expressing their religious belief that homosexuality is a sin. *Id.* at 203, 218. Applying the standards set forth in *Tinker* and its progeny, the Third Circuit concluded that the policy went beyond permissible restrictions and was overbroad. *Id.* at 216-17.

In addition to the lack of any actual conflict among the Seventh and Third Circuits based upon the *Hedges* decision, *Hedges* and *Saxe* are distinguishable from this case at several levels: neither case involved distribution of proselytizing items during *in-class* school sponsored pre-kindergarten, kindergarten and first grade instructional events. Moreover, on the day of the latter two events, Respondent provided Petitioner with on-premises alternatives for distribution of the candy canes with the attached religious messages. Accordingly, the decision in *Hedges* is not analogous to Petitioner's case.

Similarly, no conflict between the Circuits exist based upon the Seventh Circuit's opinion in *Muller*, *supra*. In *Muller,* the Seventh Circuit addressed application of a school district's general policy which regulated the time and location of literature distribution to an elementary student's circulation of invitations to a religious meeting. 98 F.3d at 1532. Upholding the policy, two members of the three judge panel agreed that the applicable test "is whether the restrictions on student expression are 'reasonably related to legitimate pedagogical concerns.'" *Id.* at 1540 and 1545 (citing *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 267 (1988)). Upholding the distribution limitations and nonpublic fora conclusions reached in *Hedges*, the *Muller* Court found the *Hazelwood* test consistent with *Tinker v. Des Moines Independent Com. Sch. Dist.*, 393 U.S. 503 (1969). *Id.* at 1540.

Assuming, *arguendo*, that Petitioner's understanding of *Muller* is correct, Petitioner recognizes that *Muller* does not resolve the issue within the Seventh Circuit. Pet'r['s] Br. pp. 12-13. At most, *Muller* establishes that the issue of whether *Tinker* applies in the elementary school setting remains unresolved within that Circuit. Hence, Petitioner's reliance upon *Muller* as a basis to contend that a conflict among the Seventh and Third Circuits is misplaced.[2] Moreover, two members of the three judge panel applied the same analytical framework in *Muller* as applied by the Third Circuit in this case.

Petitioner's failure to establish facts supporting his claim of viewpoint discrimination before the Courts below, combined with facts establishing the lack of such discrimination, undermines a key presumption relied upon in support of Petitioner's prayer for the issuance of a Writ granting Certiorari. In short, no conflict exists among the Third and Seventh Circuits which warrants issuing a Writ of Certiorari.

II. THE THIRD CIRCUIT APPLIED THE APPROPRIATE FIRST AMENDMENT ANALYSIS WHICH IS BASED UPON ESTABLISHED LEGAL PRINCIPALS APPLICABLE IN THE PARTICULAR CONTEXT.

The Third Circuit's analysis followed a recognized framework and applied established legal principals to the particular facts before the Court. Petitioner's attempt to

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2. Unlike the *Muller* case, the type of forum and concomitant analysis is not an issue in this case since the Petitioner conceded that the forum was a nonpublic forum which, in turn, dispensed with the need for an exhaustive analysis of *Tinker*. App. B11-12; App. B12, n.4.

disparage the opinion of the Court as incomprehensible or divergent from established legal principles, as well as Petitioner's blunderbuss claim of confusion regarding the framework applicable in such cases, is unfounded.

The Third Circuit's analysis specifically recognized the basic proposition announced in *Tinker* and developed by its progeny: "while school students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,' a school's need to control student behavior will necessarily result in limitations on student speech." App. A9 (citing *Tinker, supra*); *see also Tinker,* 393 U.S. at 506 (1969) (The free speech rights of students must be "applied in light of the special characteristics of the school environment."); *Lee v. Weisman*, 505 U.S. 577, 592 (1992); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (The rights of students to express themselves at school are not coextensive with the rights of adults to express themselves in other settings. "[Instead,] there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). *Tinker* held that the non-disruptive expression by high school students which occurred outside the context of school sponsored activities was protected under the First Amendment. In particular, *Tinker* centered upon a school's prohibition which singled out a particular form of symbolic speech because of its political viewpoint even though it did not "intrude upon the work of the schools or the rights of other students." 393 U.S. at 508, 510 and 514. Recognizing the distinctions raised within *Tinker* and its progeny, including the nature of the in-class school sponsored

activities and the closed nature of the forum, the Third Circuit applied the *Hazelwood* framework.[3]

A review of the underlying legal principals in conjunction with its analysis establishes that the Third Circuit's application of *Hazelwood* was correct.[4] Activities which are supervised by school faculty and designed to impart particular knowledge or skills to student participants are fairly characterized as part of the curriculum, may be reasonably perceived as bearing the imprimatur of the school[5] and, accordingly, fall within the purview of a school's authoritative control. *Hazelwood*, *supra,* 484 U.S. at 271; App. A11, A14 and A19. It is irrelevant whether or not the activities occur in a traditional classroom setting. *Id.* Further, the continued exercise of supervision and control over the activity supports the conclusion that it is part of the curriculum. *Id.* at 268-270. In this context, educators maintain greater control over student expression to assure that

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3. Petitioner conceded that the pre-kindergarten, kindergarten and first grade classrooms were nonpublic fora. App. B11-12. As a result, forum analysis and discussion of the non-applicability of limited public forum cases was unnecessary. App. B12, n.4.

4. In *Hazelwood,* the school maintained control over articles which appeared in a school newspaper that were written and edited by high school students as part of a journalism class. *Hazelwood*, *supra,* 484 U.S. at 262. The Petitioners claimed a violation of their First Amendment rights when administrators removed two stories, one that addressed student pregnancy and another regarding the impact of divorce on students, prior to printing the paper. *Id.* at 263-64.

5. A court is not required to determine with certainty that dissemination of particular material would be construed as an endorsement by the school. *Hazelwood, supra*, 484 U.S. at 272.

participants learn the lessons the activities are designed to teach, that [recipients of the message] are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. *Id.* at 271-72; App. A11. School officials are given wide latitude in choosing which educational values to emphasize and the means through which those values are promoted by them. *See Poling v. Murphy*, 872 F.2d 757, 762-63 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990). Educators do not violate the First Amendment by exercising control over student speech in expressive activities provided it is reasonably related to legitimate pedagogical concerns. *Id.* at 273;[6] App. A11 and A19.

Legitimate pedagogical concerns include taking into account the maturity level of the intended audience in determining whether to disseminate student speech on potentially sensitive topics. *Id.* at 272; *Tinker*, *supra*, 393 U.S. at 515 ("[A governmental actor] may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presumption of First Amendment guarantees.") (Stewart, J., concurring); *DeNooyer v. Livonia Public Schools*, 799 F. Supp. 744 (E.D. Mich. 1992), *aff'd*, 12 F.3d 211 (6th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bell v. Little Axe Independent School District No. 70*, 766 F.2d 1391 (10th Cir. 1985); App A11-13. Additionally, public school is intended to instill learning and prepare children for meaningful lives and citizenship. *See Zykan v. Warsaw Com. Sch. Corp.*, 631 F.2d 1300, 1304

6. As noted above, the analytical framework developed in *Hazelwood* was accepted as the appropriate framework by two members of the three judge panel in *Muller, supra.*

(7th Cir. 1980). Accordingly, the age of the student bears an important inverse relationship to the degree and kind of control a school may exercise. *See Sch. Dist. v. Schempp,* 374 U.S. 203, 290-91 n.69 (1963) (Brennan, J., concurring); *Fraser, supra,* 478 U.S. at 683-85; *Muller, supra*, 98 F.3d at 1539-40 (citations omitted) (Concluding school could preclude a grammar school student from distributing invitations to a religious meeting in his fourth grade classroom reasoning that an elementary school "may restrict such speech that could crush a child's sense of self-worth."); *see also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (Noting that elementary school children "are impressionable and their [attendance] at school is involuntary."); App. A8-A10.

The Third Circuit applied the above analytical framework and legal principals to the following facts: (1) Petitioner's proselytizing occurred during classroom activities that had a clearly defined curricular goal which included teaching social skills, respect for others and sharing (App. A16 and A17); (2) each event was highly structured, supervised and regulated (App. A17); (3) based upon the tender age of the students, the school generally prohibited the exchange of gifts that promoted a specific message (App. A16); and (4) several factors demonstrated the school's continual control over each event including the teacher's role in planning the events, the PTO's control over gift collection as well as distribution, and the directive of generic gifts (App. A17).

The Court also relied upon the fact that the stated purpose of Petitioner's mother "was to promote a religious message through the channel of a benign classroom activity." App. A19. It is axiomatic that there is no stronger association with a school than activities which occurs inside a classroom.

The fact that each event occurred in the classroom during school hours, at a school sponsored event, lends further support for the conclusion that the Respondents properly requested Petitioner to distribute his proselytizing items in areas outside of the classroom. As noted by the District Court, "if the [Respondents] had made an exception to the policy, to permit [Petitioner's] religious messages while precluding others, the possibility is real that a reasonable observer would perceive the [Respondents] as endorsing this religious message." App B23, n.10 (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 605 (1989)).

Petitioner's bare argument that if in-class events constitute an "organized curricular activity" then it is difficult to imagine any activities at the elementary school level outside of that description is not only an over exaggeration, it ignores the practical educational environment of a pre-kindergarten, kindergarten and first grade class recognized by the Courts below. Pet'r['s] Br. p. 19. Elementary grade school children do not attend a traditional four hour lecture style class at this developmental stage in their education. Additionally, Petitioner did not explain the basis for, and provided no credible evidence to support, the contention that the pre-kindergarten, kindergarten and first grade in-class events do not squarely fit within the types of activities described in *Hazelwood*.

Petitioner's reliance upon *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) is misplaced. That case involved a religious club which sought access to the school's limited open forum created by the school board's policy. The risk of the perception that the board endorsed a student religious club was not supported by the facts because the activities occurred after school hours, the activities were

presented by individuals who were not faculty members, and student attendance was not mandatory. Most importantly, in *Good News Club*, parental permission was required, the children-participants were not all the same age, the activities would take place in a combined high school resource and middle school special education room, not in an elementary school classroom, and there was no oversight by teachers.

Contrary to Petitioner's argument, the Third Circuit has not obliterated all First Amendment rights of elementary students. App. A14, n.4 ("While an elementary school deserves greater discretion to control its curricular activities, individual student expression still may be appropriate depending on the context"); App. A18 ("As noted, elementary school students retain certain First Amendment rights of expression."); App. A18-19 ("*And* where the school solicits individual views in a classroom assignment, students should be able to respond in a non-disruptive manner.") (emphasis added); *Walker-Serrano v. Leonard*, 325 F.3d 412, 416, 417 (3rd Cir. 2003) ("That the First Amendment protects student expression within schools is beyond challenge . . . That age is a factor in this calculus does not necessarily mean that third graders do not have First Amendment rights under *Tinker*. *Tinker* provides a flexible standard that arguably is able to incorporate these considerations")[7] Moreover, the Court concluded that as to the distribution of the candy cane story, there was no deprivation of Petitioner's First Amendment rights. App A18.

Petitioner contends that Third Circuit's opinions in *Walker-Serrano v. Leonard*, *supra*, and *S.G. v. Sayreville*

7. In *Walker-Serrano*, neither party urged the court to consider the case under *Hazelwood* or *Fraser*, 325 F.3d at 416.

Bd. of Ed., 333 F.3d 417 (3rd Cir 2003), *cert. denied*, 124 S. Ct. 1040 (2004) establish that the Third Circuit does not recognize any meaningful First Amendment protection for elementary school students. Pet'r['s] Br. p. 23. Contrary to Petitioner's claim, the Court's opinion in *Walker-Serrano* did not strip elementary students of their First Amendment rights. 325 F.3d at 418 ("In any event, we see no reason at this point to conclude that, as a general matter, these concerns cannot be addressed under the case-by-case approach specified in *Tinker*.") Instead, the Court applied established legal doctrine which recognizes, *inter alia*, the significance of certain practical realities: age bears an inverse relationship to a student's First Amendment rights in a school environment. *Id.* at 416. The Court recognized that, in an elementary school setting, such rights must be counterbalanced by the proscription against interfering with the rights of other young students, the potential for subtle coercion and valid parental prerogatives established by *Tinker* and subsequent decisions. *Id.* at 418-420. Most importantly, the third grade student in *Walker-Serrano* occasioned no constitutional harm: the school encouraged other expressions of the student's opposition to the field trip, permitted distribution of other materials, including coloring books and stickers, which expressed the student's views and she was not disciplined for circulating the petition or prevented from obtaining permission to circulate the petition at a different time or location. *Id.* at 419.

Against a backdrop of three incidents involving violent statements made by students which involved reference to firearms and a horribly tragic nationally publicized incident of a six year old child shooting another, the Third Circuit upheld a school's discipline of a student for stating to another student that "I'm going to shoot you." *S.G. v. Sayreville Bd.*

of Ed., 333 F.3d 417 (3rd Cir 2003), *cert. denied*, 124 S. Ct. 1040 (2004). The contemporaneousness of the events played a key role in its decision. Nonetheless, the Court did not dismiss the First Amendment in a perfunctory manner. Rather, the Third Circuit recognized that the freedom to advocate unpopular views in school must be counterbalanced against society's interest in teaching students socially appropriate behavior. *Id.* at 421, 422.

A student's First Amendment rights continue to have meaningful value in the Third Circuit. *See Sypniewski v. Warren Hills Regional Bd. of Ed.*, 307 F.3d 243 (2002), *cert. denied*, 123 S. Ct. 2077 (2003). In *Sypniewski*, the Third Circuit overturned a District Court decision where a student was prohibited from wearing a T-Shirt because it contained language generally similar to that banned by the school board's policy. *Id.* at 254-57. Although the school's concern arose because of a history of racial tensions and recent threats of violence, the Court required significantly more than a mere general similarity among the terms association with white supremist gang activity which were banned and a somewhat related term contained on the student's T-Shirt. *Id.* Absent significantly stronger proofs, the Court refused to apply *Tinker's* proscription against expression that interferes with school operations or the rights of others. *Id.*

The foregoing establishes that the Third Circuit's analysis and application of *Hazelwood* does not represent a substantial departure or unwarranted extension of First Amendment jurisprudence nor the elimination of First Amendment rights in the elementary school context.

CONCLUSION

For all of the foregoing reasons, Respondents Egg Harbor Township Board of Education and Superintendent Dr. Leonard Kelpsh pray that the Court denies Petitioner's request for the issuance of a Writ of Certiorari.

Respectfully Submitted,

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